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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRANK L. PERKINS,

PETITIONER,

-vs-

ROBERT R. RAINES,

RESPONDENT.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

FRANK L. PERKINS
P.O. Box B-36916
Florence, Arizona 85232
Petitioner - Propria Personam

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REPLY TO RESPONDENT ARGUMENT I:

The Respondent Argument Number One submits that the Circuit Court did not abuse its discretion in denying Petitioner's application for a Certificate of Probable Cause.

In reply Petitioner submits that Appendix "B" of Petitioner's Petition for Writ of Certiorari to this Court factualizes that the Circuit Court dismissal order is based upon the statement:

> "The court concluded that the double punishment argument being rnised was without merit. See Picket v. Boykin , 118 Ariz. 261, 576 P.2d 120 (1978); United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979). Accordingly, the Petition for Rehearing, received May 31, 1981, is denied. No further motions for reconsideration will be entertained."

In reply to Respondent's assertion, Petitioner respectfully submits that neither Boykin nor Clayton, citations (Id.) apply to facts of this case nor to Petitioner's factually submitted contentions claiming that his present sentence, and incarceration based upon same, constitutes double punishment violative of the Fifth, Sixth and Fourteen Amendments of the United States Constitution and the Article Ten, Section Two ban against double punishment in the Constitution of the State of Arizona.

The issue of facts dealt with in Boykin, citation (Id.), is different and does not mesh with the facts presented here. The Arizona Supreme Court held that incarceration as a part of probation is not a sentence to confinement but is, instead, a condition of probation established at the time sentence is suspended. The court went on to state that where the defendant was found to have violated his probation, the Superior Court was authorized by statute to modify the orginal conditions of probation and could require that defendant to serve a full period of incarcertaion; under such circumstances, the sheriff could not grant double time allowance. Emphasis Added. The issues are not the same, and most certainly Mr. Perkins's present sentence is not

statutorily authorized. As previously submitted, a narcotic offender who has not been previously convicted would be punishable under A.R.S. 36-1002.02(A), which authorizes a five year minimum sentence. See Appendix A-I, R.T. of hearing, October 13, 1978, incorporated herein by reference thereto. It is specifically indicated at p. 53, lines 21 through 23:

> The Court
>
> Perhaps if you had gone and served your flat five years--you realize you are facing seven possible mandatory fives.

The court clearly states that the sentence that would have been imposed by the court, had the defendant not been given probation at the orginal sentencing, would have been five years (emphasis added), which further supports Petitioner's claim of being incarcerated as a result of an illegally imposed sentence which is statutorily unauthorized enhancement, constituting double punishment. The Fifth Amendment to the United States Constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Article Two, Section Ten of the Arizona Constitution provides the same protection. Benton v. Maryland, 395 U.S. 784 (1969) provides that the United States constitutional prohibition against double jeopardy shall apply to the states. The Supreme Court in Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873) held that double jeopardy protections are violated when an individual's sentence is increased after service of his sentence has commenced. Here, by the trial court's own admission, is increasing the orginal sentence (five flat years) that the court could have imposed. In State v. Wheeler, 108 Ariz. 338, 498 P.2d 205 (1972) the Arizona Supreme Court held that double jeopardy prohibitions applied; the first sentence could not be lawfully increased. The double jeopardy prohibitions apply also in sentences involving probation. In United States v. Best, 571 F.2d 484 (9th Cir., 1978), a trial judge was made to realize that his original sentence, ordering prison and probation on three separate counts, was statutorily excessive. He then "corrected" the sentence to make the punishment for the second and third counts,

probation, to run consecutively to the prison term in one count. That would have been a lawful sentence, if first imposed. However, the Court of Appeals wrote:

> "We recognize that the district court judge could have lawfully imposed the disputed sentences at the time of initial sentencing. However, we refuse to sanction a broad rule which would allow a sentence to be changed to conform with the original intention of the sentencing judge. Such a rule would present too great a potential for abuse." P. 486.

The application of the double jeopardy provisions to a sentence of probation is again seen in Sullens v. United States, 409 F.2d 545 (5th Cir. 1969). The sentencing judge ordered Sullens to a short prison term and probation at the same time. However, the judge then learned that credit for time served would make Sullens ineligible for the "split sentencing" provision. The judge then called his first sentence improper and resentenced Sullens to a longer prison term. The Fifth Circuit Court held that increasing a sentence after a defendant has commenced to serve it is a violation of the constitutional guarantee against double jeopardy. The court held that Sullens was entitled to immediate release. Here, Mr. Perkins's initial sentence, seven years probation and sixty days in prison, upon being revoked was increased and a consecutive sentence imposed which he has to serve in the future of 15 to 20 years for unlawful transportation of narcotics. State v. Watson, (1978) 120 Ariz. 441, 586 P.2d 1253. The court held that double jeopardy applies (1) wherein individual is tried and convicted and it is sought to prosecute him again for the same or included offense, or (2) where a person has been convicted and sentenced and an attempt is then made to increase sentence. State v. Bollander, (1975) 112 Ariz. 35, 537 P.2d 22. Petitioner further respectfully submits that to prevent even the appearance of vindictiveness (prohibited under Blackledge v. Perry, 417 U.S. 21 (1974)), the trial judge must not be permitted to resentence a defendant to a higher term than originally stated.

From the trial court's own words, the original sentence the Court would have imposed was five flat years. Arizona REvised Statute 36-1002.02(F), under which Mr. Perkins's original sentence (seven years probation and sixty days in prison) would have been authorized, specifically states:

> "Any person convicted of a violation of this section shall upon sentencing be committed to the Department of Corrections for not less than thirty nor more than sixty days." (Emphasis added).

and substantiates that Mr. Perkins was in fact sentenced, and the second sentence imposed after the probation revocation was an increase of the original sentence constituting double punishment. The fact that Mr. Perkins had no previous convictions further substantiates that his present minum sentence, being fifteen years, is violative of Arizona Revised Statutes, Section 36-1002.02(A) which authorizes a minimum sentence of five years. Petitioner submits that Respondent's reply does not meet with the stated facts of Petitioner's contentions. Picket and Clayton, citations previously given, are not on point with this case.

REPLY TO RESPONDENT ARGUMENT II:

Respondent submits that this Court does not have jurisdiction to grant Petitioner's Petition for Writ of Certiorari. In reply, respectfully submitted for this Court's consideration, Petitioner states that the contentions raised herein and previously raised in both state and federal court proceedings are in harmony with the issues submitted to this Court in Hicks v. Oklahoma, ____U.S. _____, 100 S.Ct. _____, 65 L.Ed. 2d 175 (1980). The Court held that imposing punishment is not merely a matter of state procedural law, but is a liberty interest that the Fourteenth Amendment to the United States Constitution preserves against arbitrary deprivation by the state. The Petitioner, Mr. Perkins, has in fact been denied due process of law as guaranteed to him by the Fourteenth Amendment and by statute under Arizona Law, Ariz. Rev. Statutes, Section 36-1002.02. Mr. Perkins having no previous convictions, he should

have been sentenced to a minimum sentence of five years. Respondent's submissions and contentions in regards to this Court lacking jurisdiction are without merit, based upon the substantiated facts and contentions appertaining to the Petitioner's Petition for Writ of Certiorari to this Court.

CONCLUSION

Petitioner having not the ability to bring pleadings to the courts, has proceeded by trial and error, through the efforts of fellow prison resident Benny Dixon, prison no. 27498, who has no formal tutoring in law. The pleadings have continued out of conviction more than ability to intelligently and clearly argue the issues; appointment of counsel was sought in Federal District Court. Based upon same, Petitioner prays that errors in the form of the pleadings be construed liberally, that the Petition for Writ of Certiorari be granted, and moves this Court to grant such other and further relief deemed necessary and appropriate.

Respectfully submitted,

Frank L Perkins
FRANK L. PERKINS

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1st DAY OF SEPTEMBER, 1981.

Carson O. McWilliams
NOTARY PUBLIC

My Commission Expires April 16, 1984

My Commission Expires

CERTIFICATE OF SERVICE BY MAILING

I, Frank L. Perkins, Petitioner herein, being first duly sworn, upon my oath depose and say: that I am the Petitioner in No. 81-5082, Petition for Writ of Certiorari, United States Supreme Court, and that on the 2nd day of September, 1981 I caused to be deposited in the United States Post Office, located at Arizona State Prison, Florence, Arizona, 85232, the following:

Reply to Response to Petition for Writ of Certiorari;

that (17) and (1) copy was placed in an envelope addressed to each of the following parties:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

and

Robert K. Corbin
Attorney General
c/o Barbara A. Jarrett
Assistant Attorney General
Attorneys for Respondent
State Capitol Building
West Wing -- 2nd Floor
Phoenix, Arizona 85232

Further, the Affiant saith not.

Frank L. Perkins
FRANK L. PERKINS

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1st DAY OF SEPTEMBER, 1981

Carson O. McElhaney
NOTARY PUBLIC

My Commission Expires April 16, 1984
My Commission Expires

IN THE SUPERIOR COURT OF

THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

Plaintiff,

vs.

FRANK L. PERKINS,

Defendant.

Nov 8 1978
[illegible] Clerk
[illegible]

No. A-31397

TRANSCRIPT OF HEARING

(Excerpt)

October 13, 1978

Appendix-A-I

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,

Plaintiff,

-vs-

FRANK L. PERKINS,

Defendant.

No. A-31397

BE IT REMEMBERED that the above-entitled cause came on regularly for further hearing, before the Honorable ALICE TRUMAN, Judge in the above-entitled court, on the 13th day of October, 1978.

APPEARANCES:

RICHARD ROLLMAN, Deputy County Attorney appearing for the Plaintiff.

NORMAN R. FREEMAN, Esq., appearing for the Defendant.

done nothing to demonstrate that he appreciated what the court did when it first sentenced him to probation or did anything to make sure that he didn't get into trouble.

He repeatedly has been in trouble and nothing has changed. I just don't think the man deserves probation.

I don't think he is the type of person that probation is intended for, and I think the probation should be terminated and he should be sentenced to prison.

THE COURT: Mr. Perkins, the court hereby terminates your probation.

I feel thatit was practically an insult to anyone's intelligence to hear your half hearted explanation of why you didn't get in touch with the probation department, why you didn't do this. People are more intelligent that that. You are not kidding me a bit. I made a big fat mistake putting you on probation in the first place. Perhaps if you had gone and served your flat five years -- you realize you are facing seven possible mandatory fives. I explained that to you when I took your allegations of guilty to these charges for revocation.

Best Copy Available

Anyone who is facing that and still thinks that I could believe the lame excuses you gave for totally ignoring your responsibility on probation, and you haven't been doing anything right since you have been on probation.

We should have had you in here a long time before. You didn't make your reports, you went to California and the court should have been advised. I have taken that up with the probation department. When one with your serious charges leaves the jurisdiction, doesn't keep in touch, we should keep closer track of you. I'm sorry we haven't.

I'm not, however, going to turn you loose on the public any longer.

I have made my mistake and you have proved it to me. You can call this an administrative violation. I call it a total disregard for your probation, total disregard and total irresponsibility and total failure to realize what the law means and what you have to do to pay your debt to society.

I'm sorry you are going to have to do it now and I don't take pleasure in making mistakes. I'm sorry you couldn't have made it

to have a consecutive fifteen to twenty on the transportation.

Those are consecutive to the first. That means you are going to serve fifteen to twenty on the first five counts and then fifteen to twenty on the last two counts, six and seven, to be served consecutively. That means you are going to do a flat ten years before you are going to be able to get out of prison.

Now, I don't do this with pleasure. I am sorry to see it happen. It is the will of the legislature and the people that when someone like you reacts the way you do on probation and to the court, they don't even take much pleasure in giving someone a chance who had the kind of record you had.

I leaned over backwards to give you a chance. It just didn't pay at all, and I am now sentencing you on the first three counts fifteen to twenty years to be served concurrently, and then on the last two counts fifteen to twenty years concurrently, but those two terms to be served consecutively to your first five.

You understand? It is a little confusing. I am not sure the defendant understands it, but you understand the outcome. The first

five counts go concurrently fifteen to twenty, so it is just like you were having one count fifteen to twenty and then another counts fifteen to twenty consecutively to that. That means you have two consecutive terms, one to be served after the others.

You are further advised that you have the right to appeal from the sentence of the court. Please take a copy of your rights. And I think in a case like this we better read them over to him.

I will read them to you.

You have the right to appeal from this proceeding. Your attorney has, no doubt, told you that and I want to besure you understand all of your rights.

You must file a notice of appeal within twenty days of the entry of judgment and sentence. That is twenty days from today. If you do not file a notice of appeal within twenty days you will lose your right to appeal.

The entry of judgment and sentence occurs at the time of sentencing. It is occurri right now, so you have twenty days from today.

If you do not appeal you may not ever another opportunity to have any errors made in th

on probation.

You lied to everybody and to your probation officer, and you lied to me today on the stand. I can't accept somebody like that on probation.

Until you learn --

MR. PERKINS: I --

THE COURT: Don't talk. You have had your chance.

So I am committing you to the department of corrections and you are hereby sentenced to a term of not less than fifteen and not more than twenty on each of the five counts of unlawful sale of narcotics.

Those counts are to be served concurrently. That is, the first five counts on unlawful sale of narcotics. That means you will have to do a five year flat term to get rid of those five counts.

How you behave yourself will depend on how you get along over there. Then on the three counts of -- two counts of unlawful transportation, I am going to sentence you to fifteen to twenty on each one of those to be served concurrently, but those two terms shall then follow consecutively on the first five, so you are going

C E R T I F I C A T E

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

I, Joseph A. Trujillo, do hereby certify that as Official Court Reporter in the Superior Court of Pima County, Arizona, I was present at the hearing of the foregoing entitled case; that while there I took down in shorthand all the oral testimony adduced and proceedings had; that I have transcribed such shorthand into typewriting and that the foregoing typewritten matter contai: a full, true and correct transcript of my shorthand notes so taken by me as aforesaid.

Court Reporter.